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No. 91-2067

In The

Supreme Court of the United States

October Term, 1992

NORA D. BRAYSHAW, M.D.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, STATE BOARD OF MEDICAL EXAMINERS

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QUESTIONS PRESENTED

1. Has due process under the Fourteenth Amendment to the United States Constitution been violated by the State of New Jersey State Board of Medical Examiners where the Board ordered a temporary suspension of the license of a physician whose self-styled "bio-psychiatry" practice was found to constitute an imminent peril to the public, where the Board provided an opportunity for immediate reinstatement of the physician's license on condition that she refrain from the specific conduct alleged to constitute the peril, and where the physician at all times refused to practice under those limitations and, via a calculated defense "strategy of attrition," succeeded in delaying final disposition of the case?

2. Has due process under the Fourteenth Amendment to the United States Constitution been violated by the New Jersey State Board of Medical Examiners where the Board exercised its regulatory authority to protect the public welfare by directing petitioner to produce her own patient records which she is required by Board rule to prepare, maintain and produce for inspection, for those patients alleged in the disciplinary proceedings to have been subjected to gross and repeated malpractice by Brayshaw, where the Board did not compel those patients to produce their medical records of treatment by non-testifying physicians uninvolved in the case in recognition of the privacy interests of those patients, and where the Board authorized the Administrative Law Judge to exercise judicial discretion to nevertheless compel release of records deemed highly relevant to the defense, which discretion was exercised?

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The Writ should be denied because the decision of the Superior Court of New Jersey, Appellate Division, affirming the Final Decision of the New Jersey State Board of Medical Examiners, raises no special and important matters, and is consistent with State and Federal requirements of due process in administrative proceedings of agencies entrusted with professional licensure and disciplinary responsibilities. Petitioner has presented no special and important reason for review by this Court, as delay in the final disposition of this particular contested administrative law case was caused directly by petitioner and/or the trial strategy of her own attorneys.

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COUNTERSTATEMENT OF THE CASE

Petitioner Nora Brayshaw, M.D. seeks to avoid the consequences of her repeated malpractice as to thirty-one patients of whom fourteen suffered gross malpractice, as well as from her misrepresentation and professional misconduct in her medical practice which the Administrative Law Judge/Board of Medical Examiners and the Appellate Division of the Superior Court of New Jersey found

to be amply documented by the record developed in a 56-day hearing.[1]

Following an investigation during which Dr. Brayshaw was represented by an attorney,[2] Brayshaw

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[1] As used herein, Pb refers to petitioner's brief; Pa refers to petitioner's appendix; PaE refers to petitioner's exhibits filed separately with the Court Clerk, which include integral portions of the Board's Final Decision omitted from Pa12.

RaE refers to an appendix of respondent Board's exhibits, one copy of which has been filed with the Court Clerk, which contains highly significant pages of the Administrative Law Judge's Initial Decision listing all evidence exhibits at trial – all of which pages were omitted by petitioner from her appendix and from her separate exhibits, and other documents of importance in this case. RbNJ refers to respondent Board's brief filed with the Superior Court of New Jersey, Appellate Division; RaNJ refers to respondent Board's appendix filed with the Superior Court of New Jersey, which included these RaE exhibits.

[2] Upon notification of the imminent service of the Verified Complaint seeking emergent temporary suspension, Dr. Brayshaw discharged her first attorney Matthew P. Boylan, Esq. (RaE"395"). She appeared *pro se* at the Board hearing, accompanied by her lawyer husband David Brayshaw who disclaimed representation of her at that time. She was thereafter represented before the Board and the Office of Administrative Law by Steven I. Kern, Esq.(Ra13). After Mr. Kern's departure following 26 days of the hearing, Brayshaw presented George Kovacs, Esq. to serve as "partial attorney" along with her husband in the conduct of the hearing. Since Mr. Kovacs refused to take legal responsibility for the defense, however, the ALJ declined to permit him to serve as partial counsel. Next, Brayshaw offered Clifford P. Sheehan as nominal counsel of record with her husband David Brayshaw admitted *pro hac vice* (RaE404-405). After that designation was

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was served with a detailed Verified Complaint and extensive supporting investigative materials seeking temporary suspension of her license by the State Board of Medical Examiners.[3] The Complaint included certifications/affidavits of 12 treating physicians regarding 26 patients, 9 patient/family certifications,[4] and examples of Brayshaw's patient records. She was charged with gross and repeated negligence by her prescribing of Synthroid

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revoked for misconduct, and Brayshaw discharged both her husband and Mr. Sheehan, she represented herself *pro se*. In October 1989, she named Cardonsky and Carroll, Esqs. as her new attorneys to present oral argument on her filed Exceptions (Pa14). Then she retained the firm of White and Williams to represent her on appeals to the Appellate Division and the New Jersey Supreme Court (Pa2). Present counsel Cravath, Swaine & Moore thus constitute the seventh set of attorneys for her in this matter.

[3] The Board of Medical Examiners is an administrative agency within the executive branch of the government in the Department of Law and Public Safety. It is composed of licensed physicians and other health care professionals and public members designated by *N.J.S.A.* 45:1-2.2 and *N.J.S.A.* 45:9-1, appointed by the Governor. Petitioner is grossly in error in describing the Board as a "private association of medical practitioners" (Pbii).

[4] Contrary to petitioner's unsupported claim (Pb3) that inquiry was started "at the behest of competing endocrinologists", she is aware, via discovery provided, that investigation was begun after receipt of complaint from a distraught patient, E.J. This was soon amplified by an avalanche of independent information from various kinds of physicians reporting treatment of former Brayshaw patients who had consulted for distress, including thyrotoxicosis, following her prescribed and unmonitored Synthroid program (RaE1-6).

(a synthetic thyroid hormone) without physical examination and at substantial dosages; with failing to appropriately monitor those patients; and failure to be available to and respond to patients experiencing significant adverse symptoms. She was also charged with misrepresentation and deception by issuing laboratory reports with altered references ranges, on letterhead of "DNB Laboratories," an entity owned by Brayshaw and her husband, when there was in fact no such actual laboratory and DNB itself had not performed the lab tests (RaE1-2). Two Supplemental Complaints were thereafter filed, alleging gross and repeated malpractice regarding 14 additional patients; the sending of a letter to each patient involved in the Complaints attempting to intimidate them from testifying; and the mailing by Brayshaw to her patients of a document prepared by a subsequent treating physician of three of her patients, which document Brayshaw truncated in such manner as to make it appear falsely that the other doctor was in favor of her treatment (RbNJ2).

At the temporary suspension hearing, the Board considered the Attorney General's evidence, the documentary material submitted by Dr. Brayshaw and her own testimony acknowledging her style of practice. The Board concluded that continued unrestricted practice by her posed a clear and imminent danger to the public, and entered an order September 9, 1987 pursuant to *N.J.S.A.* 45:1-22 temporarily suspending her license and barring her from prescribing Synthroid but indicating that the Board would permit her to practice under specified conditions which would promote protection of the public in the interim (RaE1 to 8). By its terms, the Order did not

become effective until September 23, 1987 to allow Brayshaw time to appeal. When she did, much later, choose to appeal the temporary suspension, after review of the case her emergent application for stay was denied by the Appellate Division of the Superior Court of New Jersey (RaE9). Nor did she immediately then – or ever – choose to resume practice on the protective terms of the Board Order; her license therefore remained suspended since that date and until the conclusion of the case (Pa3). Within a week of the effective date of the Order, the Board transferred the case to the Office of Administrative Law (OAL) for trial (Pa4).[5]

The OAL initially scheduled a prompt series of 28 hearing dates; 16 of those days were later cancelled at the request of Brayshaw's attorney (See, in part, PaE396 to 403). Other cancellations were: 1 day for a State holiday, 1 day at Complainant's request[6], 1 day for illness of

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[5] Brayshaw's request for "accelerated hearing" was thereafter denied (Ra100). That procedural option is reserved for uncomplicated cases and, as defined in OAL rule *N.J.A.C.* 1:1-9.4, requires that the case be conducted **without** discovery and **without** submission of post-hearing briefs, and with a 15-day limit for issuance of the ALJ Initial Decision and for Final Decision by the Board. Both the ALJ and the Board found that rule inappropriate for a 40-patient medical malpractice and professional misconduct case (Ra100). The Board did order the hearing schedule expedited (Ra100), and it was accordingly scheduled at the OAL in precedence over other cases, commencing November 30, 1987 (Pa13).

[6] The prosecuting Deputy Attorney General needed to attend a motion in the separate proceeding filed by the Brayshaws in the District Court of New Jersey, Docket No.

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Administrative Law Judge (ALJ) Weiss coupled with the seeking, by Brayshaw's then counsel Steven Kern, of leave to appeal an order with the Appellate Division of Superior Court. One other break resulted when the OAL Director required that another interrupted Medical Board case be concluded because it involved seven defendants and their attorneys including Dr. Brayshaw's then counsel and the prosecuting Deputy Attorney General on behalf of the Attorney General.

Trial speed was also controlled by Brayshaw's admitted defense of a "strategy of attrition" against the Attorney General's witnesses: e.g., the defense conducted 5.5 days of cross-examination of expert-plus-fact witness Dr. Robert Rosenbaum for 2 days of his direct examination about 5 patients, and 10 days of cross-examination of expert Dr. William Green for 4.5 days of his direct examination on 10 patients (RaE10; RbNJ9).[7]

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88-126 against every individual member of the Board of Medical Examiners, 1 medical office, 2 hospitals, every physician who had provided an affidavit to the Enforcement Bureau during the investigation, a Bureau investigator, and the prosecuting D.A.G. The Hon. Nicholas H. Politan, U.S.D.J., abstained from entertaining the merits of the Complaint pending the final outcome of the State proceedings then underway and denied the Brayshaw's application for preliminary injunctive relief. He terminated the case administratively, ruling that it may be reactivated upon conclusion of the State administrative and judicial proceedings (RbNJ10).

[7] Petitioner suggests at Pb 6 that her attorney Steven I. Kern was "overwhelmed by the bulk of repetitious counts, the

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The trial continued to be protracted, again by Brayshaw's own doing, after Attorney Kern left the case. After Brayshaw's voluntary and secretive departure from New Jersey, she wrote specifically requesting that only two witnesses be scheduled per day (Ra12). But thereafter, Brayshaw never informed the ALJ or the Attorney General when she might choose to appear at trial; the ALJ consequently delayed the start of trial each morning to see if Brayshaw would appear. Ultimately, Brayshaw wrote to the ALJ waiving cross-examination on any day that she was not present in court (Ra14). In fact, she did not appear until the last few days of trial. The totality of this conduct resulted in many of the extra trial dates which had to be arranged and fitted into the heavy schedule of ALJ Weiss (who was also the OAL Assignment Judge).[8]

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pace of the process, and Brayshaw's depleting funds." In fact, Mr. Kern's moved on the 27th day of trial to withdraw as counsel because of substantial misrepresentations allegedly made to him by Brayshaw in addition to non-payment. The entirety of those proceedings was conducted separately and then sealed by the Hon. K. Springer, an independent ALJ specially assigned, to avoid affecting the ongoing trial before the Hon. Steven Weiss, ALJ and the Board of Medical Examiners. In the course of the withdrawal proceedings, Brayshaw offered into evidence her letter to Mr. Kern dated April 21, 1988, marked NB3 in Evd, approving his "strategy of attrition rather than pushing to streamline and expedite the case" (Ra9).

[8] Petitioner complains of "erratic scheduling of trial days" (Pb7). In fact, in addition to conference calls by the ALJ with regard to certain specific dates, a specific schedule of dates as contiguous as possible was sent to her by the OAL in advance.

During the course of the 56-day trial at the Office of Administrative Law and thereafter, there were over 226 exchanges of correspondence and orders issued by the ALJ and by the Board, in addition to multiple motions made by Brayshaw to the Appellate Division, which were denied. Brayshaw was provided ample opportunity to be aware of all charges against her, to know the evidence to be presented on the charges and to cross-examine witnesses against her. Brayshaw was provided the opportunity to subpoena witnesses and records within the provision of rules of the OAL and of the New Jersey Supreme Court, and to present her own defense through fact and expert witnesses, even to the extent of allowing her to present a transcript of earlier testimony at the Board's second emergent suspension hearing, which had not permitted full cross-examination by the Attorney General. (A small sample of the hundreds of documents was provided in the appendix, volumes I and II, submitted by the Board to the Appellate Division of Superior Court at RbNJii to vi).

Careful attention was paid at trial to the issue of Brayshaw's patient records and her own informed refusal to release almost 1/3 of them, and the warning and implementation of consequences of that refusal (Pa52-53; RaNJ 112-114; RbNJ9-11). Those matters had earlier been reviewed interlocutorily by the Appellate Division which then denied her leave to appeal (RaNJ119,120). In its decision on the merits of Brayshaw's appeal, the Appellate Division found the sanctions order "clearly warranted" as well as not to have greatly affected the outcome of the case (Pa10).

Special attention was further given to Brayshaw's demand, with regard to all patients listed in the Complaint, for all medical records prepared for them by treating doctors before and after her own treatment, although the Attorney General's case did not rely upon testimony or records from physicians uninvolved in the trial. The Board, by Order issued December 16, 1987, rejected Brayshaw's demand for such records, but nevertheless recognized that there may be circumstances when records of non-testifying physicians may include potentially highly relevant information, and authorized the ALJ to make a careful and reasoned ruling on such applications as might be presented in the future (Pa51,52). As the Board noted, "Respondent's [Brayshaw's] patients were not on trial" (Pa52). The ALJ did in fact exercise that discretion regarding numerous records and made individualized determinations when records or parts thereof might warrant release to Brayshaw.[9] The entirety of the Board's December 16, 1987 Order, including the rulings denying "accelerated hearing" in the circumstances of this case, denying Brayshaw's demand for subpoenaes to testifying doctors to release records of their own patients

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[9] The ALJ signed numerous administrative subpoenaes at Brayshaw's request, and later found it necessary to require her to attach a cautionary letter with subsequent subpoenaes when it became apparent that she was routinely violating the terms of the ALJ Order regarding access to otherwise confidential medical records from physicians uninvolved in the case (RaNJ205). Many of the records provided to her are noted in the ALJ Exhibit List (RaE19), which Brayshaw has failed to provide to this Court although it was part of the ALJ's Initial Decision.

who were **not** involved in the case, and authorizing exercise of ALJ discretion regarding Brayshaw's access to records of **non-testifying** treating doctors for patients who were involved in the case, was affirmed on March 31, 1988 by the New Jersey Supreme Court (RaNJ109).

At the conclusion of trial, the ALJ prepared a 177-page Initial Decision, to complete which he needed and received one extension of time; it was filed on September 1, 1989 (RbNJ19). The ALJ found numerous violations of the Uniform Enforcement Act, *N.J.S.A.* 45:1-21, and the Truth-in-Laboratory Billing Act, *N.J.S.A.* 45:1-10, and concluded that Brayshaw needed extensive retraining and significant limitations on any future practice (PaE270 to 274). The ALJ also assessed penalties and costs (PaE274-275). On October 6, 1989 the Board sought and received one extension of time for determination of final decision, in order to adequately review the voluminous trial record (RbNJ19). On November 8, 1989 the Board announced its findings of fact and conclusions of law on the public record, to be followed by a 58-page written Order memorialized February 14, 1990 and filed February 29, 1990 (Pa12). Factual corrections were made to the Order, filed March 14, 1990.[10]

Contrary to petitioner's selective and minimized description of the Board's findings (Pb3), in fact Brayshaw was found guilty of many instances of gross

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[10] Petitioner has attached at 12a the **uncorrected** version of the Board Order. Among the highly significant differences was the corrected number of days when Brayshaw was represented by Attorney Kern at trial: 26, not 19 (compare Petitioner's Appendix 13a).

malpractice as well as repeated malpractice in the manner by which she prescribed for and treated her patients, not only with Synthroid but with strong psychoactive drugs; she sought to "wrap herself in the protective cloak of 'consultant' " (Pa44), but in fact she was not acting as a traditional psychiatrist providing psychological therapy; she held herself out as a "biopsychiatrist" providing "neuroendocrine consultation," yet she refused to examine patients, and she prescribed medication to her patients without assuring that their physical status was initially and periodically ascertained by a responsible physician who could consult with her (Pa21-22,4849). Desperate patients tried to contact her to report severe adverse symptoms; the Board noted "the callous response with which their pleas for help were met" (Pa21-22). The Board also found that Brayshaw had misrepresented and had violated the Laboratory Truth-in-Billing Law, *N.J.S.A.* 45:1-10, by failing to disclose the actual laboratory which had performed the lab tests she ordered (Pa23-25). She had also secretly altered, for her spurious "DNB Labs" reports, the true reference ranges which had been utilized in the reports from the original labs. Thus, as the ALJ had succinctly phrased it: "As it was, the patient did not know that a value shown to be outside DNB's range of 'normal' was not outside the testing laboratory's 'normal' range. This was wrong" (PaE132). Brayshaw was also found to have engaged in misrepresentation and professional misconduct in truncating the original written material from endocrinologist Dr. Joel Ehrenkranz (who had treated 3 of Brayshaw's patients suffering from excess Synthroid), to falsely make it appear that he was in favor of her method of treatment (Pa50,51).

The Appellate Division considered each of the issues raised by Brayshaw: the purported denial of an effective hearing at the temporary license suspension proceeding and of certain discovery she had demanded; the lengthy temporary suspension of license; the filing of the two Supplemental Complaints; as well as the length of the hearing process. In the circumstances of this case, the Court found none of her claims to have merit (Pa8 to 11). The Court noted the extensive chronology by which Brayshaw had been informed of the charges and the conducting, at Brayshaw's request, of a special second emergent hearing on the temporary suspension application at which she presented expert witnesses prior to the OAL trial. The recommendation to continue the suspension had been specifically reviewed by the Appellate Division which then denied her motion for a stay and dismissed her appeal as interlocutory. The Court also found that much of the delay in the trial was engendered by Brayshaw's difficulty with her own counsel and her own move to California (Pa10). The Court further concluded that there were

> overwhelming efforts by the ALJ to be fair and impartial and to afford Dr. Brayshaw every opportunity to meet the serious allegations of the complaint. The complaint itself was explicit as to the charges so that any deprivation of discovery does not appear to have been harmful. As to the unfortunate length of time that the temporary suspension lasted, appellant steadfastly refused to accede to the seemingly reasonable conditions under which she could have continued her practice [Pa10].

All the other procedural and substantive issues advanced by Brayshaw, identical to those raised before this Court, were found by the Appellate Division to be without merit (Pa11) and it affirmed the Board Order. The New Jersey Supreme Court denied Brayshaw's petition, with costs (Pa1).

SUMMARY OF ARGUMENT

The Writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the State Board of Medical Examiners, which was affirmed by the Appellate Division of the Superior Court of New Jersey, and was found without merit for certification by the Supreme Court of New Jersey, meets any of the jurisdictional requirements of Rule 10. The decision does not conflict with any due process requirements imposed by the 14th Amendment of the United States Constitution which would be applicable to the State. Rather, in deciding that Brayshaw had been given a fair trial and that the decision was well supported by the evidence presented, the Board and the New Jersey Appellate Division properly interpreted and applied the law governing due process in licensure disciplinary proceedings. The decision raises no important question of federal law which has not been, but should be, settled by this Court.

Contrary to petitioner's contentions, Dr. Brayshaw was accorded, throughout, not merely standard discovery and trial procedures applicable to all litigants in New Jersey disciplinary proceedings, but in fact was accorded

special accommodation in many respects by the trial judge and the Board. Due process was accorded in the Board's proper finding that she was guilty of instances of gross and repeated negligence in her treatment of numerous patients, professional misconduct in her dishonest truncation of a witness' affidavit, and failure to comply with the Truth-in-Laboratory Billing law of New Jersey when deceiving her patients about her hidden financial interest in a "laboratory" to which she referred her patients for testing, which laboratory was in fact a sham entity.

Even if delay in disposition of a contested administrative law case were, in unusual circumstances, deemed to warrant judicial relief, no such relief is warranted in this case where the primary delays were caused directly by petitioner and/or her own attorneys.

Since the decisions below are entirely consistent with constitutional requirements for due process in licensure disciplinary proceedings, no basis exists for granting review of the writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, AFFIRMING THE FINAL DECISION OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, AND TO WHICH THE SUPREME COURT OF NEW JERSEY DENIED CERTIFICATION, IS FULLY CONSISTENT WITH STATE AND FEDERAL REQUIREMENTS OF DUE PROCESS IN ADMINISTRATIVE PROCEEDINGS OF AGENCIES ENTRUSTED WITH PROFESSIONAL LICENSURE AND DISCIPLINARY RESPONSIBILITIES.

This case involved a peculiar medical fact pattern and also a peculiar procedural pattern, both resulting primarily or exclusively from the conduct of petitioner herself. The medical facts are virtually unique in Board case history: a self-styled biopsychiatrist who makes endocrine deficiency diagnoses on patients whom she refuses to physically examine; makes diagnoses based on results she presents in fraudulently prepared lab reports; and who refuses to accept desperate calls from patients taking the prescribed large doses of Synthroid when the patients are suffering signs cumulatively indicative of thyrotoxicity while on the medication, such as chest pain, sweating, palpitations, severe headache, agitation, diarrhea, tremor and other symptoms.[11] (See ALJ Initial Decision, PaE100 to 257 and Board Decision, Appendix Pa21 to 55).

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[11] Petitioner refers at Pb7 to this panoply of horrors as "mild health effects" of her prescribed Synthroid treatment.

The case was procedurally unique in that Brayshaw deliberately chose a "strategy of attrition" to drag on the case while still represented by counsel; then removed herself from the State without notice to the ALJ or Complainant Attorney General; kept her whereabouts unknown except through a post office box and her husband's California office telephone; regularly sent lengthy facsimile complaints to the ALJ – often without notice to Complainant Attorney General; prior to the Initial Decision had professional relationships with five different attorneys and then represented herself *pro se,* but never told the ALJ or Complainant when she would or would not appear in Court; and insisted on Complainant presenting only two witnesses per day but still failed to appear personally at trial until the last few days.

Brayshaw again here repeats her contention below that she was denied due process at her temporary suspension hearing. Although opportunity for such hearing is not even required in certain cases where there is an important government interest accompanied by substantial assurance that the deprivation is not baseless or unwarranted, *Federal Deposit Insurance Corporation v. Mallen,* 486 *U.S.* 230 (1988), citing *Barry v. Barchi,* 443 *U.S.* 55 (1979), nevertheless, Brayshaw was in fact given fair notice of and opportunity to contest the initial temporary suspension proceedings and to appeal the decision. The Appellate Division denied her emergent application for stay of the Board Order and she did not further appeal that determination (RaNJ90). It must also be noted that Brayshaw continues to ignore the fact that the Board's suspension order did not foreclose her opportunity to practice medicine, provided that she conformed to the

minimum protective provisions the Board found essential. Later in the trial, she again moved to vacate the temporary suspension without accepting the protective provisions; that motion was carefully considered and denied by the ALJ and affirmed by the Board, which found her proposed continuation of her previously alarming practice would **still** constitute peril to the public (RaNJ132,139).

Brayshaw contends that her rights to due process were abridged because there is no **pre-determined** date for a definite conclusion of a disciplinary proceeding. Clearly, no such date could be established by law, as trial lengths will vary depending on the number of charges, witnesses, trial tactics, and judicial evaluation of the evidence and post-hearing briefs, among many other considerations. Brayshaw's citation of *Ampuero v. Dep't of Professional Regulation,* 410 (*So.*2d 213 (Fla.1982) is inapt, as no date had there been set for trial for an extended period of time. By contrast, here the Board of Medical Examiners promptly transferred the case to the OAL which commenced trial November 30, 1987. Petitioner's citation of *Gershenfeld v. Justices of the Supreme Ct. of Pa.,* 641 *F.Supp.* 1419 (E.D.Pa.1986), where **no** time limits were established for final decision in a case, is entirely inapt to this matter where Brayshaw's case was governed from the outset by New Jersey's Administrative Procedure Act, *N.J.S.A.* 52:14B-10(c) which, along with *N.J.A.C.* 1:1-18.1 specifies the timeframe of 45 days from the close of the hearing to issuance of the Initial Decision. That date may be extended, only for good cause shown, by the Director of the OAL. Good cause was shown here, in light of the large number of issues and volumes of trial testimony

and evidence which the ALJ had to address. *N.J.A.C.* 1:1-18.1 similarly permits extension of the 45 days which are otherwise set for issuance of the final decision of the agency; good cause was demonstrated for that single extension in this case as well. Brayshaw's argument at each level of appellate review in New Jersey was properly found to be without merit, and similarly does not constitute a violation of the Fourteenth Amendment.

Where delay in completion of the hearing does occur, that delay "cannot be evaluated in a vacuum." *Mallen, supra,* at 486 *U.S.* 242. Well recognized factors must be considered in determining "what process is due to protect against an erroneous deprivation" of a property interest. *Mathews v. Eldridge,* 424 *U.S.* 319 (1976). In evaluating the significance of the delay, it is appropriate to examine the importance of the private interest and the harm occasioned by the delay, the justification offered by the Government and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken. *Mallen* at 242. As recognized in *Mallen,* the case may be a serious one and may involve complex issues and an extensive evidentiary record; *Id.* at 244. That was certainly the case here. As in *Mallen,* one must consider the magnitude of the public interest in a correct decision, *Id.* at 244, - here, by the Medical Board in light of the broad scale of the malpractice and misrepresentations charged (and ultimately largely proved). Also, as in *Mallen* at 244, greater weight may be given to the public interest, especially where injury to the suspended person's reputation is not likely to be augmented beyond that caused by the original public order of suspension;

here, an Order which the Appellate Division saw fit not to disturb. Thus, there was no denial of due process in the circumstances of this case.

Significantly, as the Appellate Division recognized, Brayshaw retained throughout these proceedings the ability to resume an appropriate medical practice, merely by conforming to the protective conditions set by the Board at the initial temporary suspension, conditions the Appellate Division found "reasonable" (Pa10). She failed, however, to exercise that right.

Nor were any of petitioner's due process rights violated by denial of discovery to which she was entitled. She was provided with discovery material regarding every expert and/or fact physician-witness who provided subsequent treatment to Brayshaw's patients and who testified on behalf of Complainant, and their records for those patients were available except as otherwise prohibited by law.[12] Brayshaw's contention that there were "different" standards of discovery and that this prejudiced her by denying access to records which she demanded for cross-examination (which she did not trouble to attend), related primarily to her demand that she be allowed to inspect the treatment records of those doctors as to their own patients **not** involved in the Complaint, as well as to preceding and subsequent treating doctors not involved in the case and not called to testify (Pa51-52). The Board determined, in an interlocutory order, that such access to confidential records of other persons is not appropriate

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[12] This was a single instance of examination, not treatment, of the child M.T. by Dr. Kriedman for a school child study team.

for, among other reasons, the non-pertinence to the charges against Brayshaw and also the chilling effect such a procedure would have on any expert witnesses. The ALJ was, however, given discretion to require production of records as maintained by non-testifying other treating doctors of those patients who were involved in the case even if the patients had not so consented, in unusual situations when such records are believed to include highly relevant information. The ALJ in such circumstances was instructed to make a careful and reasoned ruling on any such applications by Brayshaw. Pursuant to this Order, Brayshaw received numerous other-doctor records (RaE16 to 28, omitted by petitioner from the ALJ's Initial Decision trial exhibit list, PaE). The Board decision on those issues was ultimately affirmed by the New Jersey Supreme Court on April 4, 1988 (RaNJ109). With regard to Brayshaw's due process contentions, respondent State also notes the fact, extensively addressed by the ALJ in telephone conference calls as well as correspondence to Brayshaw, that she failed (without notice) to appear to conduct cross-examination for most of the witnesses (RaNJ196,207).

In summary, the Appellate Division reviewed the extensive record amassed at the levels of the several emergent proceedings before the Medical Board (in addition to the OAL), and the voluminous trial record amassed before the Administrative Law Judge, the numerous motions resulting in 20 different orders issued by the ALJ and the Board during the proceedings, the lengthy records presented on the 5 separate appeals to the Appellate Division considering Brayshaw's numerous motions, and the record before the New Jersey Supreme

Court, and Brayshaw's multiple motions post-Board Decision and prior to the Appellate Division decision. The Appellate Division found that the Administrative Complaint was explicit, and that Court expressed satisfaction that the proceedings before the Office of Administrative Law gave Brayshaw a full and fair opportunity to present witnesses in her own behalf, to cross-examine and rebut testimony and to present affirmative defenses before an objective factfinder (Pa10). In addition to concluding that the Board's findings and conclusions (of misrepresentation, gross and repeated negligence and professional misconduct and violations of the Laboratory Truth-in-Billing Law) were supported by sufficient evidence in the record, the Appellate Division specifically found that due process had been accorded Brayshaw at every level, despite the extraordinary burdens she had placed on the ALJ and the Board by her departure from the State in the midst of trial.

Petitioner has failed to demonstrate that this case satisfies any of the criteria for *certiorari* and thus, further review is inappropriate and unnecessary.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

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Respectfully submitted,

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